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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1232~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Appellant's jurisdictional statement adequately sets forth his position that the questions presented by this appeal are substantial. Although appellee Hartke had the right to file a motion to affirm the judgment sought to be reviewed on this appeal if he thought the questions on which the decision of this cause depends are so unsubstantial as not to need further argument (Rule 16(1) (c)), he has not done so, and the inference can be drawn that he concedes that the questions presented are substantial.

Appellee Hartke's only motion is to dismiss this appeal as moot. He contends that the swearing in and seating of

him by the United States Senate on January 21, 1971, rendered moot the controversy raised by this appeal. Such is not the case. By unanimous consent of the Senate, the oath was administered to appellee Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." The relevant proceedings are recited at page S4 of the Congressional Record for January 21, 1971, as follows:

"ADMINISTRATION OF OATHS.

"The VICE PRESIDENT. The Senators to be sworn in will present themselves at the desk in groups of four, as their names are called by the clerk in alphabetical order.

"The clerk will call the names.

* * * * *

"The legislative clerk called the names of Mr. HARTKE, Mr. HRUSKA, Mr. HUMPHREY, and Mr. JACKSON.

"Mr. CURTIS. Mr. President, I ask unanimous consent that the oath may be administered to Mr. HARTKE, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order; and I further ask unanimous consent that a letter setting forth the details be printed in the RECORD.

"The VICE PRESIDENT. Without objection, it is so ordered.

"There being no objection, the letter was ordered to be printed in the RECORD, as follows:

INDIANAPOLIS, IND.,
January 15, 1971.

Re: Statement on status of Roudebush vs. Hartke contest for U. S. Senate in Indiana.

Senator CARL CURTIS,
Senate Office Building,
Washington, D. C.

DEAR SENATOR:

Following the tabulation of votes cast for the United States Senate race on November 3, 1970, the unofficial tabulation indicated that out of more than 1.7 million votes, Senator Hartke was the leader by 4,283 votes.

Information obtained from various counties throughout the State of Indiana indicated that there may have been a large number of erroneous votes cast. Congressman Roudebush pursued the remedy set out by Indiana Statute (Burns Indiana Statutes 29-5401) and requested his right to a recount in eleven Indiana Counties. Senator Hartke filed motions to dismiss the Recount petitions in each of the eleven counties, on the premise that a recount is in violation of Article I, Section 5, of the United States Constitution.

Congressman Roudebush filed motions in opposition to the motions to dismiss. The first two courts to hear the motions to dismiss (a Republican Judge in Marion County and a Democrat Judge in Lake County) found in favor of Roudebush and ordered the recount to begin.

Senator Hartke then went to the Federal Courts (U. S. District Court, Southern District of Indiana, Cause No. IP 70-C-694) asking for injunctive relief. Judge S. Hugh Dillin granted an interlocutory injunction preventing the recount from proceeding. A three Judge panel was named (two Democrats-one Republican) and a hearing held on December 17, 1970. The Federal 3 Judge panel, by a 2 to 1 vote, issued a

restraining order preventing the recount. The Attorney General of Indiana had also opposed the restraining order on behalf of the citizens of Indiana.

Both the Attorney General of Indiana and Congressman Roudebush petitioned the Supreme Court of the United States to stay the injunction pending appeal. Justice Thurgood Marshall refused both petitions. Senator Hartke's answer to the above petitions was that to stay the injunction would do him irreparable harm.

A full appeal has now been filed in the Supreme Court of the United States. The case is pending and waiting the filing of pleadings by Senator Hartke. It is our contention that the election is not over until we have a recount, or the Supreme Court tells us we cannot have a recount. The other factor would be the unconditional seating of Senator Hartke.

I am enclosing a copy of the Jurisdictional Statement filed with the Supreme Court. It sets out the Indiana Statute pertaining to recount. The Indiana Statute does not question the Senate's right to judge the qualifications of its members, nor is the Judiciary attempting to meddle in legislative affairs. A recount is a ministerial function only—to make sure the vote count is correct. It would be difficult for the Senate to judge the election returns, if a recount is not conducted.

For all of the above reasons, we are hopeful that if Senator Hartke is seated, it will be conditioned upon the outcome of the appeal pending in the Supreme Court of the United States, and the recount, should we be allowed to conduct it. It is our belief that Congressman Roudebush was elected on November 3, 1970, and that a recount will verify his election as U. S. Senator.

Thank you for all of your assistance in this matter. Should you have any further questions, please call me.

Sincerely,

GORDON K. DURNIL,
Campaign Coordinator.

"These Senators, escorted by Mr. BAYH, Mr. CURTIS, Mr. MONDALE, and Mr. INOUYE, respectively, advanced to the desk of the Vice President; the oath prescribed by law was administered to them by the Vice President; and they severally subscribed to the oath in the official oath book."

By reason of the foregoing, it is clear that a live controversy continues to exist between the appellant and appellee Hartke.

Respectfully submitted,

DONALD A. SCHABEL,
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Attorney of Record for Appellant.

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OCTOBER TERM, 1970

No. ~~1936~~ 70-67

THEODORE L. SENDAK
Attorney General of the State of Indiana

Appellant

v.

R. VANCE HARTKE,
(Plaintiff Below)
RICHARD L. ROUDEBUSH
SAMUEL WALKER
JOHN R. HAMMOND
DUGE BUTLER
(Defendants Below)

Appellees

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INDIANAPOLIS, DIVISION

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS THE APPEAL AS MOOT

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Central Publishing Company, Inc., Indianapolis, Ind.

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OCTOBER TERM, 1970

No. 1236

THEODORE L. SENDAK
Attorney General of the State of Indiana

Appellant

v.

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(Plaintiff Below)
RICHARD L. ROUDEBUSH
SAMUEL WALKER
JOHN R. HAMMOND
DUGE BUTLER
(Defendants Below)

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
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APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS THE APPEAL AS MOOT

The Attorney General of Indiana has intervened in this suit to defend the constitutionality of the Indiana recount statute. The Federal District Court opinion found the statute unconstitutional. The Attorney General is now appealing that decision, which, if erroneous, should not